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No. 432

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Petitioner

v.

STEWART L. UDALL,
Secretary of the Interior,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Petitioner

v.

STEWART L. UDALL,
Secretary of the Interior,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Fenelon Boesche, Administrator of the estate of F. W. C. Boesche, deceased, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The November 16, 1961 opinion of the Court of Appeals is reprinted as Appendix A, infra pp. 14-16. The Court's Order granting the petition for rehearing in banc is reprinted as Appendix B, infra p. 17. The Per Curiam order of the Court sitting in banc reinstating the Novem-

ber 16, 1961 judgment of the division is reprinted as Appendix C, infra p. 18.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1961. A timely petition for Rehearing *in banc* was granted and the November 16, 1961 judgment of the Court set aside on February 21, 1962. After a Rehearing *in banc* and by per curiam opinion dated June 15, 1962, the Court reinstated the judgment of the division entered on November 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations.[1]

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 30 U.S.C. 181, provides in pertinent part:

> "* * * that deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act * * *."

Section 31 of the Mineral Leasing Act of 1920, 41 Stat. 450, as amended, 30 U.S.C. 188, provides in pertinent part:

---

[1] If the Writ of Certiorari is granted, the Petitioner may also desire to argue the related substantive question of whether there had actually been a failure on the part of the lessee in this case to comply with the Department's regulations.

"Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85, § 31, 41 Stat. 450, 30 U.S.C. 188.).

"Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . . (Aug. 8, 1946, c. 916, § 9, 60 Stat. 956, 30 U.S.C. 188)

Rev. Stat. 441, 5 U.S.C. 485, provides in pertinent part:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

• • • •

4. Bureau of Land Management

• • • •

13. Public lands, including mines.

43 CFR 192.42(d), under the heading "Noncompetitive Leases—Offer to lease and issuance of lease," provides in pertinent part:

"(d) • • • Each offer must be for an area not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:

(1) • • •

(2) Where the land is surrounded by lands not available for leasing under the Act, • • •."

STATEMENT

On September 11, 1956, petitioner's father, F. W. C. Boesche, deceased, filed application for an oil and gas lease (NM 027951) on an 80 acre tract of public land. On that date, an adjoining 40 acre tract was already under application for lease previously filed by Thomas Connell. Also on September 11, 1956, but later in the day, Vincent Cuccia and George E. Conley filed their joint application for a lease on both the 40 acres already applied for by Connell and the 80 acres already applied for by Boesche.

Accordingly, as of the close of business at the Santa Fe Land Office on September 11, 1956, the 40 acre parcel was under application by Connell as the first applicant for that parcel, the 80 acre parcel was under application for lease by Boesche as the first applicant for that parcel, and both parcels were under later application for lease by Cuccia and Conley. Thereafter, and in the following order, the Manager of the Santa Fe Land Office (1) on December 1, 1956 issued a lease on the 40 acre parcel to Connell, (2) on December 1, 1957 issued a lease on the 80 acre parcel to Boesche, (3) by decision of January 24, 1958 (J.A. 11)[2] rejected Cuccia and Conley's application for a lease on the 80 acres already leased to Boesche.[3]

Cuccia and Conley appealed from the Manager's decision to the Director of the Bureau of Land Management. By decision of January 9, 1959 (J.A. 12-14) the Director reversed the Manager's decision, holding that the Manager erred in issuing the Boesche lease and that the Boesche lease should be cancelled for failure to comply with 43 CFR 192.42(d).

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[2] J.A. refers to the Joint Appendix in the Court of Appeals.

[3] On January 17, 1957, following the issuance of the lease to Connell, Cuccia and Conley withdrew their application as to the 40 acre parcel. Hence only the 80 acre parcel remained in their application.

Boesche appealed to the Secretary of the Interior, who, through his Deputy Solicitor issued a decision on August 5, 1959 (J.A. 15-18) affirming the Director's decision and directed cancellation of the Boesche lease. The reason given by the Secretary for this action is that Boesche failed to file for the adjoining 40 acres already covered by the Connell application and therefore violated the Department's regulation, 43 CFR 192.42(d), which requires, inter alia, that a lease offer must include a minimum of 640 acres unless the land applied for is surrounded by lands not available for leasing under the Act.

Petitioner filed timely suit in the United States District Court seeking judicial review of the Secretary's decision.

The Petitioner alleged in the District Court: that there had been no failure of the lessee to comply with the Department's regulation 43 CFR 192.42(d) since the adjoining 40 acres already applied for by Connell was not available for leasing by Boesche; that assuming, arguendo, that Petitioner failed to comply with 43 CFR 192.42(d), this defect was waived by the Land Office Manager, the Secretary's authorized representative, upon his issuance of the oil and gas lease; and, that, the Secretary in the circumstances of this case, had no authority to cancel Petitioner's outstanding lease by unilateral administrative action.

By judgment dated November 23, 1960, the District Court affirmed the Secretary's determination that Petitioner had failed to comply with 43 CFR 192.42(d) and upheld the authority of the Secretary to cancel Petitioner's lease by administrative action (J.A. 22-26).

The Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. By per curiam opinion dated November 16, 1961, the Circuit Court affirmed the decision of the District Court sustaining the Secretary's action authorizing cancellation of Petitioner's

lease. The Court upheld the Secretary's determination that Petitioner had failed to comply with the Department's regulation 43 CFR 192.42(d) and upheld the Secretary's authority to cancel Petitioner's lease. Petitioner's petition for a Rehearing *in banc* was granted by Order of February 21, 1962, of the District of Columbia Circuit and the November 16, 1961 judgment of the Division was vacated and set aside. After the Rehearing *in banc*, the Court *in banc* by per curiam order reinstated the November 16, 1961 judgment of the division.

REASONS FOR GRANTING THE WRIT

1. The judgment of the District of Columbia Circuit in the instant case is in conflict with the judgment of the Tenth Circuit in *Pan American Petroleum Corp.* v. *Pierson et al.*, 284, F.2d 649 (1960), cert. denied 366 U.S. 936.

2. The judgment of the District of Columbia Circuit in this case is contrary to the principle enunciated by this Court in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

3. In the issuance of oil and gas leases the Department of the Interior is acting in a proprietary capacity. As a party to lease contracts the Government is as much bound by the contracts as the individual parties thereto. *Sinking Fund Cases*, 99 U.S. 700, 719 (1878); *Reading Steel Casting Company* v. *United States*, 268 U.S. 186, 188 (1924); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934).

The Provisions of the Mineral Leasing Act authorizing the cancellation of oil and gas leases are contained in paragraphs one and two of Section 31 of the Mineral Leasing Act, as amended, which provides as follows:

PARAGRAPH 1

"Sec. 31. Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, or the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions, thereof. (Feb. 25, 1920, c. 85, § 31, 41 Stat. 450, 30 U.S.C. 1881)."

PARAGRAPH 2

"Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas . . ., Aug. 8, 1946, c. 916, § 9, 60 Stat. 956, 30 U.S.C. 188."

Thus, Section 31 specifically provides two distinct procedures for forfeiture and cancellation of oil and gas leases, one judicial and the other administrative. And, Congress expressly limits the authority of the Secretary to cancel a lease administratively to instances when there has been a "failure of the lessee to comply with any of the provisions of the lease * * *." Congress decreed that the cancellation of a lease for any other cause must be by judicial proceedings brought in the appropriate court, as provided in the first paragraph of Section 31, *supra*.

Cancellation by judicial proceedings was the only method of cancellation authorized by the Congress until 1946, when Congress saw fit to add the second paragraph to Section 31 (60 Stat. 956, 30 U.S.C. 188) authorizing the Secretary to cancel a lease administratively where the

lessee fails to comply with lease provisions. The Congressional intent to limit the cancellation authority of the Secretary to instances where there has been a breach of lease provisions by the lessee is clear and explicit.

In the case of *Bell Oil & Gas Company* v. *Wilbur*, 60 App. D.C. 256, 50 F.2d 1070 (1931), the Court held unequivocally that the Secretary had no authority to cancel oil and gas leases except as expressly provided in the Mineral Leasing Act. In that case, the Court said: "The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into the District Court of the United States to accomplish that result by a proceeding in equity."

More recently, the United States Court of Appeals, Tenth Circuit, held in the case of *Pan American Petroleum Corporation* v. *Pierson et al.*, 284 F. 2d 649 (1960), that the Secretary has no statutory authority to cancel an oil and gas lease administratively after its issuance except for the lessee's breach of the lease provisions. The Court stated in part, at page 654:

> "* * * the Government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the lease premises. Similarly, the issuance of a patent is the last act of the government in disposing of the nonmineral lands of the public domain. Upon the performance of this last act, administrative power to annul or cancel ends and judicial power begins. The difference between a patent and an oil and gas lease is no reason for the denial of the power of administrative cancellation of a patent and for the recognition of such power to cancel a lease, unless Congress in the exercise of its authority over the public lands has provided for such administrative cancellation of leases after issuance. The only provisions of this nature in the Mineral Leasing Act and its amendments of which we are aware, relates to administrative cancellation of non-

> producing oil and gas leases issued after 1935 for breach of lease provisions, and that has no application here because cancellation is sought for fraud in procurement, not for breach of any lease provisions."

and at p. 655:

> "The Secretary of the Interior has no powers except those granted or necessarily implied from granted powers. * * * * * The courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provisions giving him the power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts. Otherwise the new system created by the Mineral Leasing Act for the disposition of the mineral reserves found on the public lands fails of its purpose. Certainty of title is an elementary prerequisite for the sound development of any mineral resource."

and at p. 657:

> "If Congress desires administrative cancellation of Federal oil and gas leases, it may, in the exercise of its Constitutional authority over the public domain, so provide in appropriate legislation, but we have no such legislation before us."

The Government's Petition for Writ of Certiorari in the *Pan American* case was denied by the Supreme Court on May 29, 1961.

The Tenth Circuit Court of Appeals in the *Pan American* case and petitioner in this case have taken the position that the Secretary's authority to cancel oil and gas leases administratively is limited by the Congress under Section 31 of the Mineral Leasing Act, as amended, to instances where a lessee has violated the provisions of the terms of the lease.

On the other hand, respondent asserts that the Secretary's authority to cancel leases administratively derives

from his general authority under the provisions of 5 U.S.C., Sec. 485.[4]

The Secretary's claim of "general authority" to cancel leases administratively is reminiscent of a similar claim advanced by the Government in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 with respect to the President's "general authority" to seize the steel mills. In that case, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills, in order to avert a nation-wide strike of steel workers in April 1952, which he believed would jeopardize national defense. The Order was not based on any specific statutory authority but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander-in-Chief of the Armed Forces. The principle enunciated by the Supreme Court in *Youngstown Co.* v. *Sawyer*, in denying the President's "general authority" to order seizure of the steel mills, is equally applicable here. Namely, that while the executive branch may invoke its "general authority" to support a course of action when the statute is silent on the subject, after the Congress has by statute provided specific procedures whereby executive action may be taken, the administrative agency cannot ignore the means provided by the Congress and attempt to achieve the same or similar results by another method of its own choice.

The Mineral Leasing Act of February 25, 1920 was enacted by the Congress "* * * to promote the mining

[4] 5 U.S.C. sec. 485 provides as follows: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: 1. Alaska Railroad. 2. Alaska Road Commission. 3. Bounty-lands. 4. Bureau of Land Management. 5. Bureau of Mines. 6. Bureau of Reclamation. 7. Division of Territories and Island Possessions. 8. Fish and Wildlife Service. 9. Geological Survey. 10. Indians. 11. National Park Service. 12. Petroleum Conservation. 13. Public lands, including mines."

of coal, phosphate, oil, oil shale and gas." In some thirty-six sections the Act proceeds to specify comprehensively and in great detail the new procedures to be followed by the Secretary in his administration of the Federal Mineral Leasing Program. Included in these sections is Section 31 providing a specific procedure governing the cancellation of leases issued by the Secretary. The Secretary, in his brief in the Court below, contends that his authority to cancel appellant Boesche's lease derives not from Section 31 of the Mineral Leasing Act, as amended, but from the general authority vested in him by 5 U.S.C. 485 to supervise public lands. This assertion of general authority is made despite the express Congressional directive contained in Section 1 of the Mineral Leasing Act of 1920 to the effect that oil and gas deposits on public lands— "* * * shall be subject to disposition in the form and manner provided by this Act * * *." Thus, in spite of this plain statutory strictures, the Secretary chooses to ignore the specific limitation by the Congress on his authority to cancel leases administratively, and instead he chooses to assert a general authority contained in 5 U.S.C. 485. In effect the Secretary asserts a right to pick and choose which of the sections of the Mineral Leasing Act he will ignore and which he will administer.

In the issuance of oil and gas leases the Department of the Interior is acting in a proprietary capacity. As a party to lease contracts the government is as much bound by the contracts as individual parties thereto. This principle has been enunciated time and again by this Court.

Thus, in the Sinking Fund Cases,[5] this Court said:

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the

[5] 99 U.S. 700, 719 (1878).

> wrong and reproach that term implies, as it would be if the repudiator has been a State or municipality or a citizen."

In *Reading Steel Casting Company* v. *United States*,[6] which was a case involving a contract to furnish steel castings to the Marine Corps, the principle was reiterated by this Court when it said:

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals"

And in *Lynch* v. *United States*,[7] this Court said:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

At the time the Department issued a lease to Boesche it entered into a contract with him. Boesche fulfilled his obligations under the contract and had every right to expect that the Department would likewise honor its obligations.

On June 29, 1962, the Tenth Circuit in *Henriques et al.* v. *Gulf Oil Corp.* No. 1945, (App. D, pp. 20-23) granted the Government's request that its appeal be dismissed on the ground that the case had become moot. The Court, however, in its per curiam opinion pointedly took judicial notice of the Interior Department's declination to accept its ruling in the *Pan American* case when it stated:

> "Representatives of the Interior Department continue to assert the right of administrative cancellation of oil and gas leases issued under the Mineral Leasing Act of 1920, and decline to accept the decision in *Pan American Petroleum Corporation* v. *Pierson*, 10 Cir., 284 F.2d 649, certiorari denied 366 U.S. 936, where

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[6] 268 U.S. 186, 188 (1924).

[7] 292 U.S. 571, 579 (1934).

we denied that right in a case of attempted administrative cancellation because of fraud in procurement."

In his Petition for a Writ of Certiorari, No. 912, Oct. Term, 1960, in the *Pan American* case, *supra*, the Solicitor General at pages 10 and 11 thereof stated:

> "* * * the administration of oil and gas on the public domain constitutes a major program of the Department of the Interior. Each year there are thousands of leases issued. On June 30, 1960, there were outstanding 139,000 leases supervised by the Department of the Interior under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended.
> "* * * in the three-year period ending June 30, 1960, there were 1,129 administrative cancellations out of the total of 54,000 leases issued during that period."

In the interest of a uniform interpretation of the Federal Statute governing administration of this major Federal program this Court should resolve the present conflict between the United States Courts in the 10th and District of Columbia Circuits regarding the Secretary's authority to cancel leases by administrative action.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16238

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased,
Appellant

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee

Appeal from the United States District Court for the District of Columbia

Decided November 16, 1961

Mr. Lewis E. Hoffman for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom *Assistant Attorney General Clark*, *Messrs. Roger P. Marquis* and *Thomas L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellee.

Before EDGERTON, PRETTYMAN, and BAZELON, *Circuit Judges*.

PER CURIAM: Appellee's predecessor as Secretary of the Interior issued to appellant's predecessor Boesche a non-competitive oil and gas lease on 80 acres of public land. After the Boesche application was filed, Cuccia and Conley filed an application which complied fully with the law and the regulations. The Secretary directed the cancellation of Boesche's lease and the District Court, we think correctly, sustained his action.

By § 17 of the Mineral Leasing Act[1] a noncompetitive lease must be issued to the first applicant who qualifies. The Secretary is authorized to make rules and regulations.[2] To promote efficient exploitation of mineral deposits on unproven lands,[3] the Secretary requires by regulation that an application must cover at least 640 acres, with two exceptions, one of which is "Where the land is surrounded by lands not available for leasing under the act . . . ."[4] We agree with the District Court that this is a reasonable and valid regulation.

"Not available for leasing" may well mean, not available for leasing *to anybody*. Accordingly the Secretary "has always considered lands covered only by an outstanding application to be available for leasing." Natalie Z. Shell, 62 I.D. 417, 419 (1955). This interpretation is reasonable and we should not reject it.[5] In interpreting "an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). When Boesche filed his application, an adjoining 40-acre tract had been applied for but not leased. Since that tract was "available for leasing" the Boesche application was insufficient.

Although the Secretary's interpretation of his regulation had "general applicability and legal effect", it was not necessary to publish it in the Federal Register.[6] "The

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[1] 49 Stat. 677 (1935), as amended, 30 U.S.C. § 226 (1958).

[2] 41 Stat. 450 (1920), 30 U.S.C. § 189 (1958).

[3] Annie Dell Wheatley, 62 I.D. 292 (1955).

[4] 17 F.R. 5615 (June 21, 1952), as amended, 43 C.F.R. 192.42(d) (1961 Supp.).

[5] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140; *Western Union Telegraph Co.* v. *United States*, 2d Cir. 1954, 217 F. 2d 579, 581.

[6] 49 Stat. 501 (1935), as amended, 44 U.S.C. § 305(a) (1958).

function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgations of rules . . . . But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. *McKay* v. *Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F. 2d 35 (1955). Cf. *Hawley* v. *Diller*, 178 U.S. 476, 495.

Affirmed.

APPENDIX B

Filed Feb. 21, 1962. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238 September Term, 1961

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased,
Appellant

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee

Before: WILBUR K. MILLER, *Chief Judge*, and EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the petition for a rehearing en banc be, and it is hereby, granted and that this case shall be reheard by this court en banc at such date as the business of the court will permit.

It is FURTHER ORDERED by the court that the judgment entered herein November 16, 1961, be, and it is hereby, vacated.

Per Curiam.

Dated: Feb. 21, 1962

APPENDIX C

Filed June 15, 1962. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,238 September Term, 1961

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, deceased,
Appellant

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee

Before: WILBUR K. MILLER, *Chief Judge*, and EDGERTON, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting in banc.

ORDER

The court in banc having granted appellant's petition for rehearing in banc on February 21, 1962, and the appeal having been reheard by the court in banc, and the court in banc now being of the view that the judgment of the division of this court should be reinstated,

It is ORDERED by the court in banc:

(1) that the order entered February 21, 1962, granting the petition for rehearing in banc and vacating the judgment of the division entered November 16, 1961, is hereby set aside;

(2) that the petition for rehearing in banc is hereby denied; and

(3) that the judgment of the division entered herein November 16, 1961, is hereby reinstated.

Per Curiam.

Dated: June 15, 1962

The case was reheard in banc prior to Senior Circuit Judge Prettyman's retirement from active service and was submitted to him on the briefs and recorded argument, but he did not participate in the foregoing order.

APPENDIX D

Filed June 29, 1962

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6945—June Term, 1962

DOUGLAS E. HENRIQUES, INDIVIDUALLY AND AS MANAGER OF THE UNITED STATES LAND OFFICE, SANTA FE, NEW MEXICO, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR; CHESLEY P. SEELY, INDIVIDUALLY AND AS STATE DIRECTOR FOR THE STATE OF NEW MEXICO, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR,

Appellants

v.

GULF OIL CORPORATION, a corporation, and CARL T. SMITH, JR.,

Appellees

Appeal from the United States District Court for the District of New Mexico

A. Donald Mileur, Attorney, Department of Justice (Ramsey Clark, Assistant Attorney General, John Quinn, United States Attorney, J. Eugene Gallegos, Assistant United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, were with him on the brief) for Appellants.

Howard C. Bratton (George H. Hunker, Jr., William V. Kastler, David W. Stephens, and Hervey, Dow & Hinkle were with him on the brief) for Appellees.

Before MURRAH, *Chief Judge*, BREITENSTEIN and HILL, *Circuit Judges*.

PER CURIAM.

The judgment of the trial court enjoined the administrative cancellation of a United States oil and gas lease. The defendant officials have appealed and now assert that the case is moot.

Pursuant to the applicable provisions of the Mineral Leasing Act of 1920 as amended,[1] appellee Smith, in October, 1958, made an offer for an oil and gas lease on three separate parcels of the public domain in New Mexico. Later, one Conley made a similar offer covering some of the same land. The Smith offer was approved and a lease issued effective August 1, 1960. Gulf has an interest in the Smith lease under conditional, mesne conveyances. The Conley offer was rejected because of the conflict with the Smith offer. On an appeal by Conley the Appeals Officer held, on February 21, 1961, that the Smith offer violated a pertinent regulation and that Conley was entitled to his lease. Pursuant to this decision appellant Henriques, the manager of the United States Land Office at Santa Fe, New Mexico, on April 21, 1961, cancelled the Smith lease, the cancellation to be effective 30 days thereafter unless an appeal was perfected. Within that period Smith and Gulf brought this action.[2]

During the pendency of this appeal, the Secretary of the Interior, in another case, construed the applicable regulation so as to sustain the validity of the Smith offer. The Acting Chief of the Division of Appeals, on May 15, 1962, vacated the February 21, 1961, decision and rejected the Conley offer. This action leaves the Smith lease in effect and no administrative proceedings for its cancella-

[1] 30 U.S.C. § 181 et seq.

[2] Pursuant to an order for a temporary injunction the manager of the Santa Fe Land Office vacated the order of cancellation. This removed any handicap which might have arisen because of the failure of Smith and Gulf to take an administrative appeal from the order of cancellation.

tion are now either pending or threatened. The objections of Smith and Gulf to the claim of the appellant officials that the appeal is moot are grounded on the possibility of the resumption of administrative cancellation proceedings.

Representatives of the Interior Department continue to assert the right of administrative cancellation of oil and gas leases issued under the Mineral Leasing Act of 1920 and decline to accept the decision in Pan American Petroleum Corporation v. Pierson, 10 Cir. 284 F. 2d 649, certiorari denied 366 U.S. 936, where we denied that right in a case of attempted administrative cancellation because of fraud in procurement. The existence of this general policy does not defeat the claim of mootness. The courts will not interfere with executive actions which have not proceeded so far as to affect individual interests adversely.[3] The rule is that a private person may not invoke the judicial power to determine the validity of executive action unless he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action.[4] In the present posture of this case Smith and Gulf stand in the same position as all holders of United States oil and gas leases.[5]

The possibility of an appeal to the Secretary from the decision rejecting the Conley offer does not change the situation. This is not the case of a private person seeking to defeat injunctive relief by protestations of repentance and reform[6] or of "short term orders, capable of

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[3] Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 72.

[4] Ex Parte Albert Levitt, 302 U.S. 633, 634.

[5] Cf. Taylor v. McElroy, 360 U.S. 709, 711.

[6] See United States v. Oregon State Medical Society, 343 U.S. 326, 333.

repetition, yet evading review."[7] As the record stands there is nothing before us to show that the appellant officials threaten to cancel the lease in question. Indeed, their counsel disclaim any such intent and we assume the good faith of all concerned. Accordingly, the case is moot.

When a civil case from a court in the Federal system becomes moot pending appeal, the approved practice is to vacate the judgment below and remand with direction to dismiss.[8] Such action in the case at bar must not be taken as any determination of the substantive issues raised on this appeal. If the Interior Department hereafter seeks administrative cancellation of the lease, this decision does not bar Smith and Gulf from maintaining an action to restrain such cancellation. Further, fairness to all in interest requires that neither the institution nor the dismissal of this action shall be deemed to deprive Smith and Gulf of any rights to contest the Conley offer in administrative proceedings.

Reversed with directions to vacate the judgment and dismiss the action.

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[7] Southern Pacific Terminal Company v. Interstate Commerce Commission and Young, 219 U.S. 498, 515.

[8] United States v. Munsingwear, Inc., 340 U.S. 36, 39.